87-1776

No. .....

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

—o—

BETTY PERKINS,

Petitioner,

vs.

EASTERN NEBRASKA HUMAN SERVICES AGENCY, a Political Subdivision,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether in a dual or mixed motive Title VII case, the Plaintiff has the burden of persuasion to establish that the unlawful motive was more likely than not the basis of the employer decision; or

2. Whether once a Plaintiff has met the burden of showing that the illegal conduct more likely than not was a motivating factor in the employment decision, the Plaintiff is entitled to some relief including, as appropriate, declaratory judgment, partial attorney fees, and injunctive relief against future or continued discrimination; however, defendant may avoid award of reinstatement or promotion or back pay if it can prove by preponderance of evidence that Plaintiff would not have been hired or promoted even in absence of proven discrimination.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1) is not yet reported.

The opinion of the District Court (App. 2) with respect to entry of its judgment on Petitioner's Title VII action is not yet reported.

———o———

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 1988. This Court has jurisdiction under 28 U.S.C.A. § 1254(1).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 2000e-2. Unlawful employment practices.

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

———o———

STATEMENT OF THE CASE

The Petitioner, Betty J. Perkins, is a black female, over 50 years of age. She was employed by Eastern Nebraska Human Services Agency (ENHSA) and brings this action claiming damages for employment discrimination.

Mrs. Perkins was employed by ENHSA as a "van driver" for more than six years before her employment was involuntarily terminated on October 19, 1983. On October 6, 1983, a name-calling incident arose involving another employee, Patricia Rea, a white supervisor. On the following day Mrs. Perkins was suspended for three days without pay pending an investigation. Suspension was then extended for another six days without pay when the investigation was allowed to continue working. The white employee was given a written reprimand.

Following the investigation Mrs. Perkins received a memo from Ms. Walter, the transportation supervisor, to

which she responded and expressed her disagreement with its accuracy. She also requested a hearing with respect to the matter.

On October 19, 1983, Mrs. Perkins appeared at the transportation office with the understanding that she would have an opportunity to present her side of what happened. However, upon arrival she received only a memo stating that her employment was being terminated. She was not given an opportunity to tell her side of the story. Mrs. Perkins brought suit in the United States District Court for the District of Nebraska under 42 U.S.C. § 1981, 42 U.S.C. § 1983 and TITLE VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, alleging damages in the form of lost wages, mental distress, and front pay in lieu of reinstatement. The basis for federal jurisdiction in the District Court is found under 28 U.S.C. § 1331.

A trial by jury was had in December, 1986, and on December 16, 1986, the jury returned a verdict in favor of the Defendant. On December 29, 1986, Mrs. Perkins made a timely Motion for New Trial or in the Alternative, Judgment Notwithstanding the Verdict, which was denied January 20, 1987. On January 28, 1987, the Honorable C. Arlen Beam, Chief Judge, U.S. District Court, entered judgment on the Title VII action in accordance with the jury verdict for the Defendant. Mrs. Perkins then made a second Motion for New Trial, or in the Alternative, Judgment Notwithstanding the Verdict, on February 5, 1987, which was denied on March 24, 1987. Mrs. Perkins filed her Notice of Appeal pro se on February 19, 1987. On April 17, 1987, Timothy J. Cuddigan, partner of the writer in the law firm of Marks & Clare, Omaha, Nebraska,

was appointed to represent Petitioner with respect to her appeal.

———o———

REASONS FOR GRANTING THE WRIT

1. 42 U.S.C.A. § 2000e-2 states that (a) shall be an unlawful employment practice for an employer to fail or refuse to hire or discharge any person or otherwise discriminate against any person with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. The *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n. 10, 96 S.Ct. 2574, 2580 n. 10, 49 L.Ed.2d 493 (1976) analysis that "before a Plaintiff can recover damages in a Title VII case he or she will have to convince the Court that race was the sole cause of the employment decision" is not appropriate in a mixed motive discharge case such as the case at bar. In a mixed motive discharge case such as the case at bar, the more appropriate analysis would be to be under the *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) principles to adopt the *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) rationale and shift the burden to the Defendant to show the Plaintiff would not have had the employment action taken even if her race had not been considered so that a Defendant showing that the Plaintiff would not have gotten a job or would have been terminated does not extinguish liability, it simply excludes the remedy of retroactive promotion or reinstatement.

2. The analysis proposed is consistent with Congress' intent that made unlawful any kind of discrimination not just discrimination that actually deprives someone of a job. We submit that it is appropriate under the facts in the case at bar to extend the *Mt. Healthy, supra,* principles to Title VII civil rights cases and we would urge the Court to grant the Writ of Certiorari.

Respectfully submitted,

BETTY PERKINS, Petitioner

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Attorneys for Petitioner

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BETTY J. PERKINS,	)	
	)	
Plaintiff,	)	CV 85-0-710
	)	
vs.	)	MEMORANDUM
	)	
EASTERN NEBRASKA HUMAN SERVICES AGENCY,	)	(Filed Jan. 28, 1987)
	)	
Defendant.	)	

This matter is before the Court for decision upon plaintiff's Title VII discrimination claim following a jury trial of plaintiff's claims under 42 U.S.C. § 1981 alleging race discrimination and 42 U.S.C. § 1983 alleging due process violations. The jury returned a verdict in favor of the defendant on both claims.

The evidence adduced at trial reveals that plaintiff was discharged from her employment with the defendant as the result of an altercation with a fellow employee. In finding in favor of the defendant on her Section 1981 cause of action, the jury concluded that the defendant did not discriminate against the plaintiff on the basis of her race. The Court finds this conclusion to be supported by the evidence and determinative of plaintiff's claim of race discrimination under Title VII. *See McIntosh v. Weinberger*, No. 85-2023, slip op. at 29 (8th Cir., January 14, 1987).

Accordingly, a separate judgment consistent with the jury's verdict and this memorandum shall be entered this date.

IT IS SO ORDERED.

DATED this 28th day of January, 1987.

BY THE COURT:

/s/ C. Arlen Beam
C. Arlen Beam, Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1396

Betty J. Perkins,	)	
	)	
Appellant,	)	
	)	Appeal from the
v.	)	United States
	)	District Court for
Eastern Nebraska Human Service Agency, a Political Subdivision,	)	the District of Nebraska.
	)	
Appellee.	)	

Submitted: December 17, 1987

Filed: January 27, 1988

Before LAY, Chief Judge, HEANEY and MAGILL, Circuit Judges.

PER CURIAM.

Betty J. Perkins appeals from the judgment of the district court entered in favor of Eastern Nebraska Human Services Agency (ENHSA) following trial in her suit based upon alleged racial discrimination in her employment in violation of Title VII, 42 U.S.C. § 2000e (1982), and 42 U.S.C. §§ 1981 and 1983 (1982). We affirm.

Perkins, a black female, was hired by ENHSA in 1977 as a van driver in the Transportation Department. Her job was to transport ENHSA's clients to various locations throughout a five-county region.

On October 6, 1983, Perkins and Patricia Rea, the dispatcher, got into an altercation at the end of Perkins' shift. Perkins was suspended without pay while supervisory staff conducted an investigation. Perkins was subsequently discharged on October 19, 1983.

Perkins filed a charge of discrimination with the Equal Opportunity Employment Commission, which issued Perkins a notice of right to sue. Perkins subsequently filed a complaint in district court, alleging that ENHSA has discriminated against her on the basis of race because she was discharged as a result of the October 6, 1983, incident. She alleged that whereas she was discharged, her white co-worker was only reprimanded, despite similarity in their job performance and behavior. Perkins also alleged that her discharge was in violation of her right to due process.

Perkins' sections 1981 and 1983 claims were tried before a jury, and her Title VII claim was tried simultaneously before the court. The jury found for ENHSA on the sections 1981 and 1983 claims, and the court found for ENHSA on the Title VII claim; judgment was entered accordingly.

On appeal Perkins alleges that she is entitled to a new trial or a judgment notwithstanding the verdict on the grounds that (1) the jury instructions improperly stated Perkins' burden with regard to proving intentional discrimination, (2) the jury should have been instructed that disparate treatment for similar conduct constituted a finding of discriminatory motive for discharging Perkins, (3) the jury was improperly instructed regarding Perkins'

burden of proving that she was denied due process, and (4) the jury should have been instructed that the presence of minorites on the personnel review committee and the fact that other minorities were hired after Perkins' discharge does not demonstrate absence of employment discrimination.

We have carefully reviewed the jury instructions, and find no reversible error. Perkins' success in pressing her section 1981 and Title VII claims rested on whether ENHSA intentionally discriminated against her. *Briggs v. Anderson*, 796 F.2d 1009, 1021 (8th Cir. 1986). The jury was properly instructed as to Perkins' burden of proof with regard to intentional discrimination. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n. 10 (1976) (Title VII plaintiff need only show that his race was a "but-for" cause for his discharge); *see also Smith v. Honeywell, Inc.*, 735 F.2d 1067, 1070 (8th Cir.), *cert. denied*, 469 U.S. 1077 (1984) (liability cannot be imposed under section 1981 without proof of intentional discrimination). Further, the jury instructions properly stated Perkins' burden of proof with regard to her due process claim. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). The jury's determination that Perkins was not intentionally discriminated against by ENHSA with respect to her section 1981 claim was binding on the trial judge with respect to that issue on the Title VII claim. *See Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146, 151 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982). Since the district court found that race did not play a part in ENHSA's discharge of Perkins, and this finding is not

clearly erroneous, we affirm the district court's dismissal of Perkins' complaint.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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(2)

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EASTERN NEBRASKA HUMAN SERVICES AGENCY, A Political Subdivision,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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app

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner, in establishing her claim of intentional racial discrimination under 42 U.S.C. 1981 and Title VII bears the burden of proof and persuasion of a discriminatory motive and causation?

2. Whether the test for causation in a Title VII case is the "but for" cause?

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OPINIONS BELOW

The opinion of the Court of Appeals (Petitioner's App. 1) is not yet reported.

The opinion of the District Court (Petitioner's App. 2) with respect to entry of its judgment on Petitioner's Title VII action is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 1988. This Court has jurisdiction under 28 U.S.C.A. § 1254(1).

ADDITIONAL STATEMENT OF THE CASE

The evidence in this case indicates that the director of transportation for the Respondent after the altercation between the Petitioner and a fellow employee requested the participants and witnesses to provide her with written statements so that she could take appropriate disciplinary action, if warranted.

All employees, except the Petitioner, complied with her request. Petitioner refused to provided her with a written version despite the director's repeated inquires.

After reviewing all the written responses, personnel files, and the Respondent's personnel policies, a decision was jointly reached by the Respondent's director of transportation, affirmative action officer and Petitioner's immediate supervisor to discharge the Petitioner.

All three participants in the joint decision based their decision to discharge the Petitioner and only reprimand the other employee for the incident upon the consensus reached by the investigation that (1) the Petitioner was the instigator, (2) had a prior history of such behavior, (3) had used the radio to transmit her language and had not responded to the allegations. Whereas the fellow employee's actions, although subject to discipline, were less culpable and she had no previous history of such behavior.

The respective race of the two employees was not a consideration in the joint decision on discipline. At the final meeting with Petitioner, the director still attempted to ascertain her response but to no avail. Consequently the director discharged her from employment at the meeting on October 19, 1983.

REASONS FOR DENYING THE WRIT

1. The narrow factual issue presented in this case was decided adversely to the Petitioner. The Petitioner neither asserts that the decision herein is in conflict with the decisions of other circuits, nor is contrary to any decisions of this Court.

Petitioner in her claim of racial discrimination under 42 U.S.C. 1981 and Title VII must establish that the Respondent intentionally discriminated against her. *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 383 (1982), *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983).

The Petitioner's burden of proof and persuasion in her case of disparate treatment requires proof of a discriminatory "motive." Proof of illegal motivation is crucial to her 1981 or Title VII disparate treatment case. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n 15 (1977).

The Petitioner bears the burden of establishing causation in her 42 U.S.C. 1981 and 42 U.S.C. 2000e-2 claims. The test for causation and resultant liability is the "but for" cause enunciated in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n 10 (1976).

Petitioner erroneously contends that the "but for" test for causation in *McDonald v. Santa Fe Trail Transportation Co.* required the Petitioner to establish that race was the sole factor in the employment decision. Petitioner's contention not only misinterprets the decision in *McDonald v. Santa Fe Trail Transportation Co.*, but mischaracterizes the Eighth Circuit Court of Appeal's application of the "but for" test for causation in her case. Despite Petitioner's contentions neither the *McDonald v. Santa Fe Trail Transportation Co.* decision nor the Circuit Court of Appeals required Petitioner to meet a stricter "sole factor" test for causation (Petitioner's App. 5).

2. Nor is this an appropriate case to consider, as suggested by Petitioner, the abandonment of the *McDonald v. Santa Fe Trail Transportation Co.* causation test for Title VII in favor of the "same decision" test for First Amendment retaliatory discharge cases announced in *Mt. Healthy City School District Board of*

Education v. Doyle, 429 U.S. 274 (1977), since the District Court found that race did not play a part in the discharge of the Petitioner. This finding by the District Court is both supported by the evidence and consistent with the jury's finding under 42 U.S.C. 1981 that the Respondent did not discriminate against the Petitioner on the basis of her race (Petitioner's App. 1, 5-6).

Consequently, the Petitioner is unable to prove racial discrimination under either the *McDonald v. Santa Fe Trail Transportation Co.* "but for" test, or the *Mt. Healthy* "same decision" test, since her race played no part in Respondent's employment decision (Petitioner's App. 5-6).

Petitioner's erroneous interpretation of the *McDonald v. Santa Fe Trail Transportation Co.* causation test is compounded by her faulty contention that her case is a mixed motive discharge case. Unlike the factual mosaic in *Mt. Healthy* in which the school board considered constitutionally protected conduct along with non-protected activity in its consideration not to rehire a teacher, Respondent considered only legitimate non-racially motivated reasons in its employment decision (Petitioner's App. 1, 5-6).

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

EASTERN NEBRASKA
HUMAN SERVICES
AGENCY, Respondent

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